

(j) Each party shall serve a copy of its final submission on the other party by means reasonably calculated so that the other party receives such submissions on the same day it is received by the ODRA.

(k) The DRO or Special Master may decide the contract dispute on the basis of the administrative record and the submissions referenced in this section, or may, in the DRO or Special Master's discretion, direct the parties to make additional presentations in writing. The DRO or Special Master may conduct hearings, and may limit the hearings to the testimony of specific witnesses and/or presentations regarding specific issues. The DRO or Special Master shall control the nature and conduct of all hearings, including the sequence and extent of any testimony. Evidentiary hearings on the record shall be conducted by the ODRA:

(1) Where the DRO or Special Master determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations and/or that resolution of the controversy will be dependent on his/her assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts; or

(2) Upon request of any party to the contract dispute, unless the DRO or Special Master finds specifically that a hearing is unnecessary and that no party will be prejudiced by limiting the record in the adjudication to the parties' written submissions. All witnesses at any such hearing shall be subject to cross-examination by the opposing party and to questioning by the DRO or Special Master.

(l) The DRO or Special Master shall prepare findings and recommendations, which will contain findings of fact, application of the principles of the AMS and other law or authority applicable to the findings of fact, and a recommendation for a final FAA order.

(m) The DRO or Special Master shall conduct a de novo review using the preponderance of the evidence standard, unless a different standard is prescribed for a particular issue. Notwithstanding the above, allegations that

government officials acted with bias or in bad faith must be established by clear and convincing evidence.

(n) The Director of the ODRA may review the status of any contract dispute in the Adjudicative Process with the DRO or Special Master.

(o) A DRO or Special Master shall submit findings and recommendations to the Director of the ODRA or the Director's designee. The findings and recommendations will be released to the parties and to the public, upon issuance of the final FAA order in the case. Should an ODRA protective order be issued in connection with the contract dispute, or should the matter involve proprietary or competition-sensitive information, a redacted version of the findings and recommendations omitting any protected information, shall be prepared wherever possible and released to the public, as soon as is practicable, along with a copy of the final FAA order. Only persons admitted by the ODRA under the protective order and Government personnel shall be provided copies of the unredacted findings and recommendations.

(p) Attorneys' fees of a qualified prevailing contractor are allowable to the extent permitted by the EAJA, 5 U.S.C. 504(a)(1). See 14 CFR part 14.

(q) Other than communications regarding purely procedural matters or ADR, there shall be no substantive *ex parte* communication between ODRA personnel and any principal or representative of a party concerning a pending or potentially pending matter. A potential or serving ADR neutral may communicate on an *ex parte* basis to establish or conduct the ADR.

## Subpart D—Alternative Dispute Resolution

### § 17.35 Use of alternative dispute resolution.

(a) By statutory mandate, it is the policy of the FAA to use voluntary ADR to the maximum extent practicable to resolve matters pending at the ODRA. The ODRA therefore uses voluntary ADR as its primary means of resolving all factual, legal, and procedural controversies.

(b) The parties are encouraged to make a good faith effort to explore

ADR possibilities in all cases and to employ ADR in every appropriate case. The ODRA uses ADR techniques such as mediation, neutral evaluation, binding arbitration or variations of these techniques as agreed by the parties and approved by the ODRA. At the beginning of each case, the ODRA assigns a DRO as a potential neutral to explore ADR options with the parties and to convene an ADR process. See § 17.35(b).

(c) The ODRA Adjudicative Process will be used where the parties cannot achieve agreement on the use of ADR; where ADR has been employed but has not resolved all pending issues in dispute; or where the ODRA concludes that ADR will not provide an expeditious means of resolving a particular dispute. Even where the Adjudicative Process is to be used, the ODRA, with the parties' consent, may employ informal ADR techniques concurrently with the adjudication.

#### **§ 17.37 Election of alternative dispute resolution process.**

(a) The ODRA will make its personnel available to serve as Neutrals in ADR proceedings and, upon request by the parties, will attempt to make qualified non-FAA personnel available to serve as Neutrals through neutral-sharing programs and other similar arrangements. The parties may elect to employ a mutually acceptable compensated neutral at their expense.

(b) The parties using an ADR process to resolve a protest shall submit an executed ADR agreement containing the information outlined in paragraph (d) of this section to the ODRA pursuant to § 17.17(c). The ODRA may extend this time for good cause.

(c) The parties using an ADR process to resolve a contract dispute shall submit an executed ADR agreement containing the information outlined in paragraph (d) of this section to the ODRA pursuant to § 17.29.

(d) The parties to a protest or contract dispute who elect to use ADR must submit to the ODRA an ADR agreement setting forth:

(1) The agreed ADR procedures to be used; and

(2) The name of the neutral. If a compensated neutral is to be used, the agreement must address how the cost

of the neutral's services will be reimbursed.

(e) Non-binding ADR techniques are not mutually exclusive, and may be used in combination if the parties agree that a combination is most appropriate to the dispute. The techniques to be employed must be determined in advance by the parties and shall be expressly described in their ADR agreement. The agreement may provide for the use of any fair and reasonable ADR technique that is designed to achieve a prompt resolution of the matter. An ADR agreement for non-binding ADR shall provide for a termination of ADR proceedings and the commencement of adjudication under the Adjudicative Process, upon the election of any party. Notwithstanding such termination, the parties may still engage with the ODRA in ADR techniques (neutral evaluation and/or informal mediation) concurrently with adjudication.

(f) Binding arbitration is available through the ODRA, subject to the provisions of applicable law and the ODRA Binding Arbitration Guidance dated October 2001 as developed in consultation with the Department of Justice.

(g) The parties may, where appropriate in a given case, submit to the ODRA a negotiated protective order for use in ADR in accordance with the requirements of § 17.9.

#### **§ 17.39 Confidentiality of ADR.**

(a) The provisions of the Administrative Dispute Resolution Act of 1996, 5 U.S.C. 571, *et seq.*, shall apply to ODRA ADR proceedings.

(b) The ODRA looks to the principles of Rule 408 of the Federal Rules of Evidence in deciding admissibility issues related to ADR communications.

(c) ADR communications are not part of the administrative record unless otherwise agreed by the parties.

### **Subpart E—Finality and Review**

#### **§ 17.41 Final orders.**

All final FAA orders regarding protests or contract disputes under this part are to be issued by the FAA Administrator or by a delegatee of the Administrator.